

UNITED STATES OF AMERICA
 BEFORE THE FEDERAL TRADE COMMISSION
 OFFICE OF THE ADMINISTRATIVE LAW JUDGES



In the Matter of

BENCO DENTAL SUPPLY CO.,
 a corporation,

HENRY SCHEIN, INC.,
 a corporation, and

PATTERSON COMPANIES, INC.
 a corporation,

Respondents.

Docket No. 9379

**COMPLAINT COUNSEL’S RESPONSE TO RESPONDENT PATTERSON COMPANY,
 INC.’S MOTION FOR *IN CAMERA* TREATMENT OF TRIAL EXHIBITS**

Complaint Counsel seeks an open and public trial, subject to the narrow exception in Commission Rule 3.45(b). That Rule sets a strict standard and high burden for Respondents seeking to withhold documents from the public record. To meet this standard, Respondent Patterson Companies, Inc. (“Patterson” or “Respondent”) must demonstrate why disclosure would result in clearly defined, serious injury, specify portions of materials for protection when appropriate, and, if seeking ten-year or indefinite protection, show exceptional circumstances warranting such protection. Patterson overreaches by seeking to withhold from the public record thousands of documents¹ including a large number of deposition and investigational hearing transcripts, many documents over three years old, and the entire report of its expert witness,

¹ Although Patterson’s Motion claims to seek *in camera* treatment for only 364 documents, {

supporting its motion only by the conclusory testimony of its counsel. Patterson fails to meet its burden under Rule 3.45(b) to explain why and what portions of each document are sufficiently confidential that disclosure would cause a “clearly defined, serious competitive injury.” Patterson, moreover, seeks either ten-year or indefinite protection for all but a small portion of its documents, making no showing of exceptional circumstances warranting this protection.

Granting Respondent Patterson’s request will deprive the public of a record that explains the Commission’s reasoning and provides guidance and deterrence – an interest that outweighs any of Respondent’s conclusory statements. Complaint Counsel therefore respectfully requests that this Court deny Respondent’s motion without prejudice until it fully satisfies the requirements of Rule 3.45(b).

I. STATEMENT OF FACTS

On September 26, 2018, Respondent filed a motion for *in camera* treatment of 364 potential trial exhibits allegedly containing confidential information. These exhibits are grouped into six categories: (1) Customer Pricing; (2) Customer Information; (3) Financial Information; (4) Marketing Assessment or Tracking Tools; (5) Personal Information; and (6) Strategic Business or Marketing Plans. Patterson’s Motion for *In Camera* Protection of Certain Documents Containing Sensitive Business Information (“Mot.”) at 4. Respondent seeks full *in camera* treatment for all documents, rather than identifying specific portions containing sensitive information for partial *in camera* treatment. Mot. Exhibit A. Respondent also seeks *in camera* treatment for either ten years or an indefinite period for 85% of the documents. *Id* at 4 and Exhibit A. Respondent submitted a declaration of { [REDACTED] } in support of its motion. Mot. Exhibit B.

II. LEGAL STANDARD

Under Commission Rule 3.45(b), the Court may grant a request for *in camera* treatment “only after finding that its public disclosure will likely result in a *clearly defined, serious injury* to the person, partnership, or corporation requesting *in camera* treatment or after finding that the material constitutes sensitive personal information.” 16 C.F.R. § 3.45(b) (emphasis added). The applicant must “make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.” *In the Matter of Otto Bock Healthcare N. Am.*, 2018 FTC LEXIS 111, at *2 (July 6, 2018) (quoting *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980)). If the applicant makes this showing, the Court weighs it against the primary reason favoring disclosure – the importance of the information in explaining the rationale of FTC decisions. *Otto Bock* at *2. As this Court recently explained, there is a “substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.” *Id.* (quoting *In re H.P. Hood & Sons, Inc.*, 1961 FTC LEXIS 368, at *5-6 (Mar. 14, 1961)). A full and open trial record provides the public with the Commission’s rationale and guidance to deter potential future violations. *Id.* at *3.

Respondent bears the burden of showing good cause to withhold materials from the public record. *Id.* at *3; *1-800 Contacts*, 2017 FTC LEXIS 55, at *3 (April 4, 2017). An affidavit or declaration “is always required” to explain sufficiently why the information is secret and material and why disclosure would cause serious harm. *Otto Bock*, at *3. For information more than three years old, there is a presumption against *in camera* treatment, defeated only by affidavit or declaration that such material remains competitively sensitive. *Id.* at *4.

If Respondent meets the burden, the length of time granted for *in camera* treatment depends on whether the material consists of ordinary business records or trade secrets. *Id.* at *5-

6. Trade secrets, like secret formulas, technical information, processes, or privileged information, may merit indefinite *in camera* treatment “in unusual circumstances.” *Id.* at *6; 16 C.F.R. § 3.45(b)(3). To receive indefinite protection, applicants must show that the need for confidentiality is “not likely to decrease over time” and that the circumstances giving rise to a serious injury “are likely to be forever present.” *Id.* at *4-5 (quoting *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at *2-3 (April 25, 1990)). In contrast, ordinary business records, like pricing information, customer names, financial information, business plans, marketing plans, and sales documents, typically receive two- to five-year protection from disclosure. *Id.* at *6.

III. ARGUMENT

A. Respondent Fails to Clearly Show Disclosure Would Result in Serious Injury

Respondent’s motion and attached declaration fail to meet the “heavy burden” requiring specific explanations why *in camera* treatment is necessary or warranted for each exhibit as required. *In re N. Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *3 (April 23, 2004). Respondent seeks to withhold many documents based on unsupported conclusions that do not show how disclosure would result in serious competitive injury. Not only does Patterson’s supporting declaration fail to provide sufficient specificity about why public disclosure of the documents will place Patterson at a competitive disadvantage, it does not even attempt to describe the potential harm. Rather, the declaration simply states that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Declaration of { [REDACTED] }

at ¶3 (emphasis added). Speculative concern with harm is clearly insufficient to meet the legal standard.

A review of a sample of the documents further demonstrates Patterson has provided insufficient justification for its assertions of serious injury due to public disclosure. For example,

Respondent seeks confidential treatment of { [REDACTED] }
{ [REDACTED] },² which are { [REDACTED]

{ [REDACTED] } Even if Patterson's { [REDACTED]

{ [REDACTED]

{ [REDACTED]

{ [REDACTED] }³

Assertions of the sensitive nature of { [REDACTED]

{ [REDACTED] }, suffers from the same flaw. { [REDACTED]

{ [REDACTED]

{ [REDACTED] } In both examples, the disclosure of

information that is available to the public can hardly constitute "serious competitive injury."

Patterson also fails to make a sufficient showing of harm with regard to documents it categorizes as containing "Financial Information." For example, its seeks *in camera* treatment

for { [REDACTED]

{ [REDACTED] }⁴ Although { [REDACTED]

² Exhibits referenced in this motion are contained in the materials submitted by Respondent in connection with its motion and listed as Exhibit A thereto.

³ Patterson Companies, Inc. 2015 Annual Report at 1. Patterson is a publicly traded company.

⁴ See, e.g., { [REDACTED] }

[REDACTED]

[REDACTED] }⁵

Patterson’s lack of specificity (and broad designations) with respect to so-called Customer Pricing documents calls this category into question, as well. For example, it asserts

{ [REDACTED]

[REDACTED] }

These examples from several of Respondent’s categories suggest that Respondent’s justifications for which documents should receive *in camera* status is systematically flawed. Even if any particular document or portions of a document may warrant confidential treatment, Patterson has failed to provide any specific information to justify such treatment.

B. Respondent Fails to Justify Why Historical Information More than Three Years Old Requires *In Camera* Treatment

There is a presumption against *in camera* treatment for information that is more than three years old, unless Respondent’s declaration shows that such material remains competitively sensitive. *Otto Bock*, at *4; *1-800 Contacts*, 2017 FTC LEXIS 55, at *3. Approximately 180 (or almost half) of the documents that are the subject of Respondent’s motion are more than three years old.⁶ Over forty of these documents are over five years old, and one ([REDACTED]) is over 10 years old. Respondent provides no justification for why the Court should depart dramatically

⁵ { [REDACTED]

⁶ { [REDACTED]

from the normal presumption and precedent and grant *in camera* treatment to information that is more than three years old.

C. Respondent’s Request for *In Camera* Treatment of Entire Transcripts and an Expert Report is Inappropriate

Respondent improperly seeks *in camera* treatment for 17 entire transcripts from investigational hearings of its employees, former employees, and its economic expert.⁷ It has made no effort to identify pages or lines that may contain sensitive information. Prior rulings of this Court make it clear that “*in camera* treatment will not be granted to entire depositions.” *In the Matter of Basic Research, Inc.*, 2006 FTC LEXIS 14, at *4 (Jan. 25, 2006). Rather, a party seeking *in camera* treatment must specify the specific portions of the testimony that it seeks to protect from public disclosure. *Id.* (citing *In re Aspen Tech., Inc.*, 2004 FTC LEXIS 56, at *5-6 (May 5, 2004)). Designations must, moreover, be “narrowly tailored” to cover only those portions of the transcript that contain the allegedly competitively sensitive information.” *Id.* at *4-5. *See also In re Union Oil of Calif.*, 205 FTC LEXIS 9, at *1 (Jan. 19, 2005).

Respondent also requests *in camera* treatment for the entirety of its expert’s report, as well as the transcript of his deposition (which has not yet taken place).⁸ As with deposition testimony, this Court has held that “[i]n *camera* treatment shall be sought only for those portions of the reports that meet the Commission’s standard.” *Basic Research* at *5 (citing *In re Aspen Tech., Inc.*, at *5-6).

⁷ See { [REDACTED] }
Although these transcripts are also on Complaint Counsel’s Exhibit List, Respondent has not requested *in camera* treatment for Complaint Counsel’s exhibits. Our opposition to granting *in camera* treatment to these transcripts applies regardless of the exhibit number.

⁸ See { [REDACTED] }.

Patterson's broad, non-specific designations of deposition transcripts and the expert report and testimony fails to meet its burden. As a practical matter, such treatment would render the public nature of the trial meaningless, as all cross-examinations of party witnesses and direct and cross-examinations of Patterson's expert would have to take place *in camera*.

D. Respondent Has Failed to Show Exceptional Circumstances Warranting Indefinite or Even Ten-Year *In Camera* Treatment.

Even for records that may qualify for *in camera* treatment, Patterson's motion overreaches by seeking to have materials withheld from the public record for excessive periods of time. For example, it seeks to have all Customer Pricing, Customer Information, Financial Information and Strategic Business or Marketing Plans receive *in camera* treatment for 10 years. Astoundingly, it also seeks to have transcripts and its expert report be accorded indefinite *in camera* treatment. Patterson has made no representation that any of its documents contain trade secrets or highly detailed cost data, and thus are the types of documents that warrant ten-year protection. In fact, it makes no particularized showing at all. On their faces, most of these documents are { [REDACTED] } that are typically protected for no more than two to five years. *See In the Matter of McWane, Inc.*, 2012 FTC LEXIS 143 at*5 (Aug. 17, 2012). As for the transcripts and expert report (which it categorizes as Strategic Business or Marketing Plans), Patterson offers no reason why testimony related to documents it believes warrant 10-year protection should receive indefinite protection. Again, Patterson has failed to meet its burden.

Finally, Respondent seeks indefinite *in camera* treatment for three documents it asserts contain "Personal Information." One of these, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. To the extent that { [REDACTED] } contain sensitive personal information, they can be redacted without requiring full *in camera* treatment. *Basic Research*, at *5-6 (permitting redaction of customer names without requiring *in camera* request for such documents).

E. Complaint Counsel Should Not Have to Address Claims for RX0737

Patterson has not only failed to demonstrate the competitively sensitive nature of most of the documents on its list, it has mischaracterized the nature of thousands of documents, representing that they constitute a single exhibit. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹ Patterson has made no specific showing for any of these documents.

IV. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court deny Respondent's motion for *in camera* treatment without prejudice until it fully satisfies the requirements of Rule 3.45(b).

Respectfully submitted,

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⁹ { [REDACTED] }

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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CERTIFICATE OF ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed documents that is available for review by the parties and the adjudicator.

October 10, 2018

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